



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: FCP - 176789

PRELIMINARY RECITALS

Pursuant to a petition filed on September 16, 2016, under Wis. Admin. Code § DHS 10.55, to review a decision by the Community Care Inc. regarding Medical Assistance (MA), a hearing was held on November 29, 2016, by telephone.

The issue for determination is whether the FC agency correctly denied the Petitioner's request for a replacement power wheelchair.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED]
Community Care Inc.
205 Bishops Way
Brookfield, WI 53005

ADMINISTRATIVE LAW JUDGE:
Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Racine County.

2. Petitioner is 38 years old. Her diagnoses include intermittent explosive disorder, cerebral palsy, and profound intellectual disability. She currently resides at an adult family home (AFH).
3. Petitioner has used a power wheelchair for over 20 years for mobility. She is unable to propel a manual wheelchair independently due to cerebral palsy and hand contractures. She is unable to speak and makes her needs known through a communication book, some signs and nodding her head.
4. Petitioner's Individual Service Plan (ISP) that was developed in June, 2016 includes the following outcomes:

Petitioner wants to continue going on community outings with staff from the home.

Petitioner wants to get staff attention throughout the day.

Petitioner wants to continue going to her mother's for visits.

Petitioner will have no incidents of seriously harming herself or others in the next 6 months

Formal supports for meeting her goals include support for continued participation in community activities and events, several times weekly with facility staff. Staff is also to monitor Petitioner for aggressive behavior.

The ISP notes that the Petitioner is trying a manual wheelchair.

The ISP further notes that the Petitioner receives behavior modifying medication: No side effects are noted or reported. Psychotropic medications appear effective at this time. Monitoring of medications are being done by PCP annually and psychiatrist every 6 months. Behavior modifying medications are being used due to explosive behaviors towards others and self-injurious behaviors.

5. Petitioner has a history of aggressive behavior including hitting others, throwing objects, using her wheelchair to hurt or attempt to hurt herself or others by running into them or getting close enough to scratch them, self-abuse and property destruction. The facility obtained a waiver from DHS to allow it to power-down the Petitioner's wheelchair as a restrictive measure to prevent Petitioner from doing harm to herself or others with her wheelchair. Without the waiver, the facility staff can power-down her wheelchair in emergency situations.
6. Between 2008 – 2013, the Petitioner had 13 incidents in which she used her power wheelchair to harm or attempt to harm others or herself. In 2014, Petitioner had three incidents in which she used her power wheelchair to attempt to harm others or herself. In April, 2015, the Petitioner had an incident where she attempted to harm others with her wheelchair. For many of these incidents, the facility powered-down her wheelchair (the facility had a waiver in place to power-down her wheelchair). In some incidents, facility staff re-directed the Petitioner.
7. Other than one incident in April, 2015, Petitioner had no other incidents of aggression with her wheelchair in 2015 and 2016.
8. Prior to June, 2016, the Petitioner was able to participate in 5 – 6 outings/week with her power wheelchair. Since June, 2016, Petitioner is able to participate in 2 – 3 outings/week with her manual wheelchair and 1:1 staff to push her.
9. On August 1, 2016, the Petitioner requested replacement of her power wheelchair because it is at a point of not being able to be repaired.
10. On August 9, 2016, the FC agency issued a Notice of Action to the Petitioner informing her that her request for replacement of her power wheelchair was denied due based on the agency's determination that it was not considered a safe way to support her outcomes. Specifically, the

agency's Notice indicates that the Petitioner has a history of attempting, and accomplishing, to harm others and self with her power wheelchair. The Notice further states that because she resides in an AFH, there is staff available 24/7 to propel her in a manual wheelchair.

DISCUSSION

The Family Care (FC) program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. Whenever the local Family Care program decides that a person is ineligible for the program, or when the CMO denies a requested service, the client is allowed to file a local grievance and/or a fair hearing request.

The state code language on the scope of permissible services for FC reads as follows:

DHS 10.41 Family care services....

(2) SERVICES. Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n(c) and ss.46.275, 46.277 and 46.278, Stat., the long-term support services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.

Note: The services that typically will be required to be available include adaptive aids; ...home modification; ... personal care services; ...durable medical equipment...and community support program services.

Wis. Admin. Code §DHS 10.41(2).

The general legal guidance that pertains to determining the type and quantity of care services that must be placed in an individualized service plan (ISP) is as follows:

DHS 10.44 Standards for performance by CMOs.

...

(2) CASE MANAGEMENT STANDARDS. The CMO shall provide case management services that meet all of the following standards:

...

(f) The CMO, in partnership with the enrollee, shall develop an individual service plan for each enrollee, with the full participation of the enrollee and any family members or other representatives that the enrollee wishes to participate. ... The service plan shall meet all of the following conditions:

1. Reasonably and effectively addresses all of the long-term care needs and utilizes all enrollee strengths and informal supports identified in the comprehensive assessment under par. (e)1.

2. Reasonably and effectively addresses all of the enrollee's long-term care outcomes identified in the comprehensive assessment under par. (e)2 and assists the enrollee to be as self-reliant and autonomous as possible and desired by the enrollee.

...

Wis. Admin. Code §DHS 10.44(2)(f).

A power wheelchair is an item of durable medical equipment which is covered under the state's plan for medical assistance if the criteria for the equipment is met. The state's plan for medical assistance addresses durable medical equipment, including wheelchairs, at Wis. Admin. Code §DHS 107.24. Criteria which must be met in order to have a wheelchair approved by the state medical assistance plan include a cost-benefit analysis and other criteria noted at DHS 107.24(4).

Each managed care organization (MCO) in the FC program is required to have policies and procedures for their interdisciplinary care management teams to use when authorizing services. The Department of Health and Family Services (DHS) requires MCOs to use the Resource Allocation Decision (RAD) method as developed and disseminated by DHS to authorize services in the FC benefit package. OFCE Memo 13-02 states as follows regarding the RAD method:

The RAD process:

- Always includes the member and is a collaborative process facilitated by IDT staff
- Clarifies the identified long-term care need and outcome associated with the request
- Assists in determining the most effective and cost-effective way to support the long-term care outcome that IDT staff clarifies during their conversation and assessment with the member.
- Includes specific documentation by the MCO, either in the RAD format, or in the absence of a DHS-approved RAD guideline, in case notes. After DHS approves a RAD guideline, the guideline serves as documentation along with the IDT staff's summary of the discussion with member.

The RAD process essentially requires consideration of the general MA criteria for determining an authorization of services – medical appropriateness and necessity, cost effectiveness, statutory and rule limitations, and effectiveness of the service – with the member's outcomes paramount in the consideration. See Wis. Adm. Code, §DHS 107.02(3)(e).

In this case, the FC agency asserts that the Petitioner's history of using her power wheelchair to harm or attempt to harm herself or others is a proper basis for denying the request to replace the power wheelchair because it is not a safe alternative to meeting her outcomes. It argues that a manual wheelchair is a reasonable and effective way to meet her outcomes and to keep her and others safe. The agency further noted that the Petitioner's behaviors with the power wheelchair decreased in recent years because she took behavior modifying medications. With a manual wheelchair, the Petitioner does not have to take as much medication as she did before. Further, the agency noted that the AFH had obtained a waiver from DHS allowing facility staff to power-down the Petitioner's wheelchair if needed to prevent her from doing harm. Powering down a wheelchair is considered a restrictive measure that cannot be done except in emergency situations or with a waiver from DHS. The agency testified that, because the Petitioner has not had any incidents for over a year, DHS probably would not approve a waiver allowing the facility to power-down the Petitioner's wheelchair. Thus, it argues, a power wheelchair should not be approved because the facility would not be able to get a restrictive measures waiver.

The Petitioner's mother asserts that the Petitioner has not had any incidents of using her wheelchair to harm or attempt to harm herself or others for 1 ½ years. She testified that community outings are extremely important to the Petitioner. She noted that when it was decided that the Petitioner would try a manual wheelchair in June, 2016, the Petitioner's mother predicted that Petitioner's behavioral issues would escalate because she would be upset and frustrated with not being able to attend as many community outings with her peers as she had before. She produced behavior logs to demonstrate that her prediction was accurate. The Petitioner's mother also asserts that the Petitioner did not require medications every time she had a community outing with her power wheelchair. The Petitioner's mother disputed the agency's assertion that the facility would not be able to get another waiver, if needed, and produced emails between DHS and the AFH manager indicating that if the restrictive measure is discontinued and the Petitioner engages in unsafe behavior in the future, a new application can be submitted. DHS also noted that the facility can always use the restrictive measure if there is an emergency, i.e. an imminent risk of serious physical harm.

While I recognize the agency's concern with the Petitioner's use of a power wheelchair, I cannot concur with the conclusion that it is not a safe and effective way to support her outcome of participating in community activities.

It is clear that the Petitioner is a very social individual and that the community outings are very important to her. The use of a manual wheelchair significantly limits the number of outings she can participate in. Because of this, there has been a significant increase in her behavioral issues since June, 2016, as predicted by her mother. These incidents are primarily triggered by peers teasing her about the manual wheelchair or about not being able to participate in outings with them and her frustration at watching her peers leave for outings that she cannot attend. The increase in her behavioral outbursts demonstrates that the use of a manual wheelchair has not achieved the goal or outcome of being a safe alternative to supporting her outcomes.

The agency is concerned about the facility not being able to get a restrictive measures waiver. The agency's argument on this issue is circular – the power wheelchair is denied because of the Petitioner's history of aggressive use of her wheelchair but she cannot get a restrictive measures waiver because she has had no incidents of aggressive use of her wheelchair for a significant period of time, but without a restrictive waiver, the facility cannot power-down her chair if she should again become aggressive with her wheelchair. The argument is internally inconsistent. Further, there is nothing to indicate that the facility staff cannot re-apply for a waiver if she should once again become aggressive and there is always an option to power-down the chair in an emergency situation.

With regard to the medications, the agency argues that it is not a good alternative for the Petitioner to continue to use behavior modifying medications in order to be safe with using a power wheelchair. This is not consistent with the ISP which states that there are no reported side effects that have been noted or reported with the use of the medications. It further indicates that the medications are regularly monitored by her treating physicians. I do not find the agency's argument on this issue compelling as there is no evidence presented that it is not safe for the Petitioner to continue to use the medications to allow her to achieve her outcomes.

In summary, I conclude that denying the Petitioner's request for a power wheelchair on the grounds that it is not a safe alternative to achieving her outcomes is not proper based on the evidence. Petitioner has not had any aggressive incidents with the chair for over a year and there are restrictive measures available if any such incidents occur in the future. The agency has not presented evidence of other alternatives that are safe and that meet her outcomes more effectively.

I note that there was no discussion at the hearing about the type of power wheelchair requested. Therefore, nothing about this decision addresses the effectiveness or approval of any particular type of power wheelchair.

CONCLUSIONS OF LAW

The agency did not correctly deny the Petitioner's request for a power wheelchair on the grounds that it is not a safe alternative to meet her outcomes.

THEREFORE, it is

ORDERED

That the matter is remanded to the Family Care agency with instructions to reverse the August 9, 2016, denial of the petitioner's request for a replacement power wheelchair; review and re-determine whether the requested power wheelchair is cost-effective and meets her needs and desired outcomes under the Family Care Program considering such a power wheelchair to be a safe way to support her outcomes; with written notice. These actions shall be completed within 10 days of the date of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

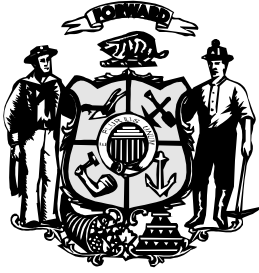
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 18th day of January, 2017

\s _____
Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on January 18, 2017.

Community Care Inc.
Office of Family Care Expansion
Health Care Access and Accountability